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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

CARLTON JOHNSON, *et al.*,

Petitioners,

v.

WEBB THOMPSON, M.D., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination solely on the basis of handicap against "otherwise qualified handicapped individuals" in federally financed programs, apply to decisions regarding medical treatment of handicapped infants?

LIST OF PARTIES

The parties to the proceedings below were Appellants Carlton Johnson, by Sharon Johnson as his next friend; Stonewall Jackson Smith, deceased, by and through Frieda Smith and John Smith; Melissa Camp, deceased, by and through Cheparney Camp; and The Spina Bifida Association of America. The Appellees were Webb Thompson, M.D., Chief of Staff and Medical Director, Children's Hospital of Oklahoma, in his individual and official capacities; Jerry D. Razook, M.D., Attending Assistant Professor of Pediatrics, Pediatric Cardiology Service, Children's Hospital of Oklahoma, in his individual capacity; Gregory Herbeck, M.S., Intern Department of Pediatrics, Children's Hospital of Oklahoma, in his individual capacity; Cynthia Houdesheldt, M.D., in her individual capacity; Richard H. Gross, M.D., in his individual capacity; William R. Burkett, Patty Eaton, Reginald Barnes, W.E. Farhas, Joseph W. Stafford, Jane Hartley, Virginia Kidd, John E. Orr, Wayne C. Chandler, Members, Oklahoma Commission for Human Services; Robert Bonar, Administrator, Children's Hospital of Oklahoma, in his official capacity; Andrew A. Lasser, Chief Executive Officer, Oklahoma Medical Center, in his individual capacity; Ron Dorris, Chief Operation Officer, Oklahoma Medical Center, in his individual capacity; Laura Tull, R.N., Ruth Tatyrek, M.S.W., John Stuemky, M.S., Michael P. Morris, M.D., all in their individual capacities; Benjamin Demps, Jr., Director, Oklahoma Department of Human Services, in his official capacity; J. Andrew Sullivan, M.D., David Yngve, M.D., William E. Barnes, M.D., Harriet Coussons, M.D., and Alan Olson, M.D., all in their individual capacities.

The Appellants below are all Petitioners before this Court. Appellees below who are not respondents to this Petition include: Robert Bonar, Administrator, Children's Hospital of Oklahoma; Andrew A. Lasser, Chief Executive Officer,

Oklahoma Medical Center; Ron Dorris, Chief Operation Officer, Oklahoma Medical Center; Laura Tull, R.N.; Ruth Tatyrek, M.S.W.; David Yngve, M.D.; William E. Barnes, M.D.; and Harriet Coussons, M.D.; and William R. Burkett, Patty Eaton, Reginald Barnes, W.E. Farhas, Joseph W. Stafford, Jane Hartley, Virginia Kidd, John E. Orr, Wayne C. Chandler, Members, Oklahoma Commission for Human Services. Only declaratory and injunctive relief were sought against these parties below, and summary judgment was entered in their favor. Summary judgment was also entered in favor of Drs. Alan Olson and John Stuemky. These judgments were affirmed by the Court of Appeals for the Tenth Circuit.

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WEBB THOMPSON, M.D., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 6, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit is not yet reported, but it is reprinted in the Appendix hereto (A-62 to -82).

The Order of Dismissal and Final Judgment of the United States District Court for the Western District of Oklahoma has not been reported. They are reprinted in the Appendix (A-56 to -61).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1343(a)(1), (3), and (4), and under 28 U.S.C. § 1331, Petitioners filed this action in the Western District of Oklahoma on October 3, 1985. In the first cause of action of their Amended Complaint filed on July 14, 1986, Petitioners sought relief for alleged violations of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (A-1 to -20). By its Order of June 23, 1987, the District Court dismissed the first cause of action for failure to state a claim (A-56 to -58).

On Petitioners' appeals, the Tenth Circuit on August 6, 1992, affirmed in all respects the Final Judgment of the District Court entered on February 8, 1990, including its Order dismissing the first cause of action on June 23, 1987 (A-62 to -82).

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973) reads in pertinent part:

> **Nondiscrimination under Federal grants and programs.**
>
> **(a) Promulgation of rules and regulations**
>
> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . .

29 U.S.C. § 706(8)[1] reads in pertinent part:

> . . . [T]he term "individual with handicaps" means . . . any person who [] has a physical or mental impairment which

[1]This definition reflects a 1986 amendment (Pub. L. 99-506) which substituted the term "handicapped individual" for "individual with handicaps".

substantially limits one or more of such person's major life activities . . . .

STATEMENT OF THE CASE

On October 3, 1985, Petitioners brought this action in the United States District Court for the Western District of Oklahoma. An Amended Complaint was filed on July 14, 1986, claiming in a first cause of action under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (hereinafter, "§ 504") that 69 infants born with myelomeningocele,[2] a life-threatening handicap, had been discriminated against solely by reason of their handicaps in an experimental research project designed to compare the results of treatment and nontreatment on infants born with myelomeningocele at Oklahoma Children's Memorial Hospital (A-1 to -20). The decisionmaking criteria and results of this program were identified in an article, which was published in a prominent medical journal. Richard H. Gross et al., *Early Management and Decision Making for the Treatment of Myelomeningocele*, 72 Pediatrics 450 (1983) (A-8, -35 to -55).

The program managers formulated criteria for selecting some infants for beneficial treatment, termed "vigorous treatment", while designating others for nontreatment, or "supportive care" (A-10, -13, -41). These selection criteria focused on non-medical factors, such as an infant's projected degree of physical or mental handicap in the event beneficial medical treatments necessary to the infant's survival were provided, as well as the familial and social resources that would then be

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[2]The Amended Complaint described myelomeningocele (spina bifida) as a disability "characterized by an opening in the spine at which a 'sac' protrudes from the body of the child" and "contains cerebrospinal fluid and nerve roots that would normally be contained within the spinal column" (A-9). It may be treated by "prompt surgical closure of the defect, preferably within 48 hours after birth, to prevent meningeal infection" (A-9). If untreated, the infant may develop hydrocephalus (cerebrospinal fluid accumulating in the brain) with resulting brain damage, and lack of beneficial treatment for this condition "predictably" leads to death (A-10).

available to the infant if he or she was treated and thus survived (A-12 to -13, -19, -49 to -51).

When an infant presented with myelomeningocele, a "team", consisting of a physician's assistant, a pediatrician, an orthopedist, a neurosurgeon, a urologist, a nurse clinician, a social worker, physical and occupational therapists, and a psychologist would be assembled to perform various diagnostic tests to "screen" the infant and his or her family (A-11 to -14, -39 to -41). In making its determination, the team used a quality-of-life formula, QL = NE x (H + S), to determine which infants would receive beneficial medical treatment and which would be denied the necessary care. In this formula, QL represented quality of life, NE represented the infant's "natural endowment," H was the contribution from home and family, and S was the contribution from society (A-12, -49 to -50).

Following its evaluation, the team made a recommendation to the parents or guardians of the infant either for "vigorous treatment" or for "supportive care" (A-10, -13, -41). "Vigorous treatment" consisted of prompt sac closure, placing a shunt if hydrocephalus (accumulation of fluid in the cranium, placing pressure on the brain) was present, and all other life-saving and routine beneficial treatment (A-13). "Supportive care" consisted in keeping the infant comfortable until death (A-13). There was no surgery to close the opening of the infant's back (A-13). When hydrocephalus was present, the cerebral spinal fluid was allowed to accumulate causing gross enlaragement of the infant's head and compression of the brain (A-13). Antibiotics were not given for infection and sedation was not prescribed (A-13). All of the infants, assuming they received early treatment, had an equal chance for survival (A-9, -11 to -12).

The Petitioner infants Carlton Johnson,[3] Stonewall Jackson Smith, and Melissa Camp were among those recommended for

[3] Carlton Johnson was born after completion of the study, but while the myelomeningocele team continued to use the study's section criteria to make its recommendation (A-9 to -10, -14).

"supportive care." Infants such as the Petitioners recommended for supportive care were not only denied life-saving, beneficial medical care for myelomeningocele, but were also denied basic medical treatment for conditions totally unrelated to their congenital disabilities — such as intraveneous fluids for dehydration and antibiotics for an ear infection (A-13, -15 to -16).

The Amended Complaint stated that the research program was a recipient of federal funds, that myelomeningocele is a handicap under 29 U.S.C. § 706 (8), and that Petitioner infants were otherwise qualified for beneficial medical treatment, but were denied this care based solely on the degree or severity of the physical or mental handicap anticipated (A-1 to -20). It also stated that if they had been non-handicapped or if they had been deemed less severely handicapped, these infants would have been provided beneficial medical treatment (A-11, -16). That is, if the lesion on the infant's spine were higher rather than lower (thus potentially involving a greater degree of physical disability) or if brain malformations were greater rather than lesser (thus potentially involving more mental disability), then the infant would have been less likely to receive medical treatment necessary for survival (A-11 to -12). The Amended Complaint noted that, whatever the projected degree of physical or mental disability, the chances of survival with treatment were the same (A-9, -11 to -12).

The Amended Complaint stated that § 504 had been violated in four ways: 1) defendants used the anticipated degree of handicap as a basis to recommend that beneficial treatment not be provided; 2) defendants used the anticipated degree of handicap as a basis for providing the parents or guardians with pessimistic prognoses for survival; 3) defendants determined on the basis of handicap that there was a pessimistic prognosis for survival, then subjected the infants to an evaluation based on disability-related and socio-economic criteria; and 4) defendants' actions caused the parents and guardians to agree to deny their infants beneficial medical treatment (A-18 to -19).

The Amended Complaint further stated that the team did not inform the infants' parents or guardians that their child was the subject of a medical research project (A-9) or that non-medical factors associated with their child's handicapping condition contributed to the team's recommendation (A-13 to -14). The parents or guardians were not furnished with balanced, complete, or accurate information necessary for them to make an informed choice on treatment or nontreatment for their child (A-13 to -15). Thus, the true decisionmaker for each infant was the research team (A-10, -13 to -14). Had they been provided with non-discriminatory information, the parents or guardians would have consented to beneficial medical treatment (A-15).

The District Court for the Western District of Oklahoma, in its Order filed June 23, 1987, dismissed the § 504 claim stating that "when the intervention of a parental decision, well based on adequate medical briefings or not, necessarily lies in the path of the infant's receipt of the benefit, it cannot be said either that the infant is otherwise qualified or that discrimination is solely because of handicap" (A-56). The District Court's Order and its Final Judgment of February 8, 1990, were timely appealed to the Tenth Circuit on March 8, 1990 (A-68).

Because the District Court dismissed the Petitioner's § 504 claim on the pleadings pursuant to Fed. R. Civ. P. 12(b)(6), the Appellate Court reviewed the lower court's Order *de novo* (A-68). On August 6, 1992, the Tenth Circuit affirmed in all respects the District Court's Final Judgment against the Petitioners, including dismissal of the first cause of action for failure to state a claim under § 504. It did *not*, however, rely on the District Court's reasoning that an infant could not be "otherwise qualified" or discriminated against "solely" by reason of handicap because parental consent necessarily lay in the path of an infant's treatment. *See infra*, p. 11 n.4. Instead, drawing upon the holding of the Court of Appeals for the Second Circuit in *United States v. University Hospital*, 729 F.2d 144 (1984), and the language of this Court in *Bowen v. American Hospital*

Association, 476 U.S. 610 (1986), the Tenth Circuit held on more broadly stated grounds that the allegations of the Complaint did not bring the Petitioners within the protection of § 504, saying:

> The infants required the medical treatment only because they were born with [myelomeningocele]. Thus, they were not "otherwise qualified" to receive medical treatment denied to them because of the alleged discrimination.
>
> * * * * *
>
> Without a showing that the nonhandicapped received the treatment denied to 'otherwise qualified' handicapped, the appellants cannot assert that a violation of section 504 has occurred.
>
> In sum, we hold that the appellants failed to state a claim for violation of section 504 and that the district court did not err in dismissing the claim brought under this section.

(A-73).

While numerous other constitutional and state law violations were argued on appeal to the Tenth Circuit, the only issue before this Court in this Petition for Writ of Certiorari is the dismissal of Petitioners' claims under § 504 of the Rehabilitation Act of 1973.

REASON FOR GRANTING THE WRIT

The Writ should be granted because the Tenth Circuit Court of Appeals, in holding that § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) does not prohibit discrimination against handicapped infants in administration of health care, has wrongly decided an important issue of federal law that this Court specifically left open in *Bowen v. American Hospital Association*, 476 U.S. 610, 624 (1986).

The Tenth Circuit's interpretation of § 504 of the Rehabilitation Act of 1973 is inconsistent with this Court's interpretation

of the statute's "otherwise qualified" requirement, undermines the legislative purpose of the Act, and conflicts with decisions of other circuits recognizing a cause of action under § 504 in programs to which access is sought *because* of one's handicap. If this rationale stands, then persons with handicaps will be significantly affected in a broad range of programs, and infants like the Petitioners, who in spite of their handicaps are qualified to receive beneficial medical care, may be discriminatorily denied such care, suffer irreparable harm, and often die without any right to redress under § 504.

In this case, the Tenth Circuit has held that § 504 does not prohibit a recipient of federal funds from discriminatorily denying medical treatment to individual infants with handicapping conditions. Its holding is based on its interpretation of the "otherwise qualified" requirement of § 504. The Tenth Circuit concluded that, in order to prove a violation of § 504 based on a failure to provide medical treatment to an infant born with a handicap,

> a plaintiff must prove that he or she was discriminatorily denied medical treatment because of the birth defect and, at the same time, must prove that, in spite of the birth defect, he or she was "otherwise qualified" to receive the denied medical treatment. Ordinarily, however, if such a person were not so handicapped, he or she would not need the medical treatment and thus, would not "otherwise qualify" for the treatment.

(A-71).

It adopted this reasoning from the opinion in *United States v. University Hospital*, 729 F.2d 144 (2d Cir. 1984), in which the Second Circuit in a split decision affirmed dismissal of a suit by the Secretary of the Department of Health and Human Services (hereinafter, the "Secretary") seeking access to hospital records that he claimed were needed to investigate the hospital's failure to treat an infant's multiple birth defects after the

parents had decided against treatment. 729 F.2d at 146. A district court had ruled that § 504 did not govern decisions by the parents, and that in relying on the parents' decision, the hospital itself did not discriminate. *United States v. University Hospital*, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd on other grounds*, 729 F.2d 144 (2d Cir. 1984).

On appeal, the Second Circuit affirmed but on broader grounds, holding that "section 504 prohibits discrimination against a handicapped individual only where the individual's handicap is unrelated to, and thus improper to consideration of, the services in question." 729 F.2d at 156. In applying this rule to the infant subject of the Secretary's investigation, the Second Circuit Court of Appeals stated two bases for its holding:

> First, the government's view of "otherwise qualified" is divorced from the statutory language. As the mainstream of cases under section 504 exemplifies, the phrase "otherwise qualified" is geared toward relatively static programs or activities such as education [citations omitted], and transportation systems [citation omitted]. As a result, the phrase cannot be applied in the comparatively fluid context of medical treatment decisions without distorting its plain meaning. In common parlance, one would not ordinarily think of a newborn infant suffering from multiple birth defects as being "otherwise qualified" to have corrective surgery performed or to have a hospital initiate litigation seeking to override a decision against surgery by the infant's parents.
>
> * * * *
>
> Second, . . . [w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was "discriminatory."

Id. at 156-57.

Thereafter, the American Hospital Association, in reliance on the precedent in *University Hospital*, challenged enforce-

ment of regulations promulgated by the Secretary under § 504. Among other things, these regulations required health care providers to post notices indicating that nourishment and beneficial medical care could not be withheld from handicapped infants, mandated health care providers to report cases of medical neglect, and outlined the Secretary's investigative authority in cases of alleged discrimination in the provision of medical treatment to handicapped infants. The District Court for the Southern District of New York declared the regulations invalid and enjoined their enforcement. *American Hospital Association v. Heckler*, 585 F. Supp. 541 (S.D. N.Y. 1984). The Second Circuit summarily affirmed, on the basis of its earlier decision in *University Hospital. American Hospital Association v. Heckler*, 794 F.2d 676 (2d Cir. 1984). This Court granted certiorari and affirmed, *sub nom. Bowen*, *supra*.

Although the Second Circuit based its decision on the broad grounds stated in *University Hospital*, a plurality of this Court in *Bowen*, in affirming, held more narrowly. While acknowledging the broad grounds of the decision below, the plurality, *per* Stevens, J., limited its inquiry to whether the four mandatory provisions of the final rules were authorized by § 504. 476 U.S. at 626. It distinguished *Bowen* from *University Hospital* by noting that *Bowen*, unlike *University Hospital*, did not involve a claim that any individual medical treatment decision violated § 504. Accordingly, the plurality did not deem it "necessary to determine whether section 504 ever applies to individual treatment decisions involving handicapped infants." 476 U.S. at 624. Three dissenting Justices (O'Connor, Brennan and White), *per* White, J., expressed the view that the Court *should* have reached the broader issue of § 504's application to medical treatment decisions involving newborn infants, with two Justices opining that the broader issue should be resolved in favor of § 504's application to medical treatment decisions involving handicapped infants. 476 U.S. at 650-56.

The *Bowen* decision affirmed the Second Circuit's ruling invalidating and enjoining enforcement of the Secretary's reg-

ulations. 476 U.S. at 647. The plurality opinion noted that the Secretary premised his authority to promulgate the regulations on the fact that they were necessary to discharge his statutory mission under § 504 because hospitals violated this statute by discriminating against handicapped newborns in the provision of medical treatment. However, in all the cases cited by the Secretary to substantiate that hospitals did in fact discriminate against handicapped infants, parental consent to the infant's treatment had not been given. 476 U.S. at 631. The plurality reasoned that a hospital's withholding of treatment on this basis could not violate § 504 because, without consent, the infant is neither "otherwise qualified" nor has he been denied care "solely by reason of his handicap." 476 U.S. at 630.

The Tenth Circuit's decision in this case squarely presents the issue deferred by this Court in *Bowen*. First, unlike *University Hospital* and *Bowen*, this case concerns discriminatory treatment of newborns whose parents' consent was alleged to be a sham since it was based on inaccurate information from the myelomeningocele team.[4] Therefore, there can be no contention here that lack of parental consent renders the Petitioner infants not "otherwise qualified" or that such lack of consent precludes a finding of discrimination "solely" on the basis of

[4]The Tenth Circuit agreed that if the myelomeningocele team's actions rendered parental consent a sham, then parental "consent" did not preclude the application of § 504 (A-69). Petitioners specifically alleged that parents did not effectively consent to withholding beneficial treatment (A-9, -10, -13 to -16). However, the Tenth Circuit held that the Petitioner infants were not "otherwise qualified" under § 504 whether or not parents consented to non-treatment (A-73).

handicap.[5] Second, unlike *Bowen*, this case *does* involve individual medical treatment decisions for handicapped newborns.

1. The Tenth Circuit's interpretation of "otherwise qualified" as requiring that one's handicap be wholly unrelated to the benefit sought is erroneous in view of this Court's interpretation that one need only show that he is qualified "in spite of" his handicap to claim the protection of § 504.

The "otherwise qualified" requirement of § 504 has been interpreted by this Court to mean "one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). The term "in spite of" is defined as "without being blocked or prevented by . . . ." Webster's Third New World International Dictionary 1170 (1976). Thus, unless the handicap prevents an applicant from meeting a reasonable and essential requirement for participating in a program or receiving a benefit, the handicap cannot be a basis for excluding an applicant from the program under § 504.

However, the language "otherwise qualified handicapped individual" could arguably be construed to refer to a person who is qualified *except for* or apart from the fact that one is handicapped, rather than *in spite of* the fact that one is handicapped. On account of this potential misinterpretation and

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[5]The Tenth Circuit viewed the allegations of discrimination based on socioeconomic status as distinct from the allegations of discrimination based on handicap. Consequently, the court concluded that discrimination was not based "solely on handicap" and the allegations under § 504 were viewed as deficient. (A-70 to -71). But here, socioeconomic status was considered only because the infant might need medical care and community resources as a result of the handicap. To exclude factors peculiarly associated with a handicap as discrimination based on a factor other than handicap is to promote form over substance: It is comparable to saying that discriminating against persons in wheelchairs is not prohibited under § 504, but discriminating against paraplegics is. *See, generally, Cushing v. Moore*, 970 F. 2d 1103 (2d Cir. 1992).

consistent with this Court's own reading, the regulations interpreting § 504 generally use the term "qualified handicapped person," rather than "otherwise qualified," reasoning that the omission of the word "otherwise" is necessary to comport with the true intent of the statute. 45 C.F.R. part 84, App. A at 362 (1990); *see also* 29 C.F.R. § 1613.702 (f) (1990); *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991). The distinction is not a mere matter of semantics, but a matter of crucial substance that bears upon the scope of § 504.

When applied to an individual seeking benefits to which the handicapping condition is irrelevant or unrelated, the interpretative distinction between the "except for" and "in spite of" constructions of "otherwise qualified" is seemingly inconsequential. Thus, a blind person might well be "otherwise qualified" for employment as a music critic, whether the term is read under either definition. Except for being blind, or apart from his blindness, the person has the qualifications to critique music. Under this Court's interpretation, he is qualified "in spite of" his handicap; blindness does not prevent him from meeting a reasonable and essential requirement for the job: the ability to listen to and critique music.

However, when the "except for" construction of "otherwise qualified" is applied with regard to a program, job, or benefit to which one's handicap is relevant, then § 504's prohibition against discrimination is rendered impotent. For example, if the same blind man applies for a job as a photographer, then his blindness is obviously relevant to the benefit or job that he seeks. Thus, an employer should be permitted to consider the applicant's handicap in determining whether he is "otherwise qualified." But if an "except for" analysis is used, then an employer would have to consider the blind man's qualifications divorced from consideration of his blindness (*i.e.*, under the fiction that he is not blind). So under § 504, the employer must hire him if blindness were the only reason the applicant would not be qualified. Clearly, if one's qualifications or eligibility for a program or benefit must be assessed apart from or in disregard

of a handicapping condition, then the handicap can never be a basis for excluding a handicapped person from a program or activity. It would be improper to even consider the handicap, whether it bore on a reasonable job qualification or not. Under this interpretation of § 504, the statute can have no application to claims of discrimination where the handicapping condition is relevant to the benefits or program sought.

This Court's interpretation of "otherwise qualified" in *Southeastern*, however, clarifies the potential textual ambiguity of the statutory language and remains valid when applied to benefits both related and unrelated to a handicapping condition. Because an applicant's handicap — blindness — would prevent him from performing a reasonable and essential requirement of a photographer's job, he would not be qualified "in spite of" his handicap.

The absurdity of an "except for" or "apart from" construction of the term "otherwise qualified" is most apparent when applied to programs or benefits designed to assist handicapped persons. One must be handicapped in order to qualify or be eligible for such programs — *e.g.*, a community living arrangement, special education, or social security disability benefits. Yet under the "except for" construction of "otherwise qualified," a person with a handicap must show that apart from or absent consideration of the handicap, he is qualified to receive the program benefit — a community living arrangement, special education, or social security disability benefits — although he can never demonstrate that he is qualified for such a benefit except for, or apart from, the handicap because the handicap is a qualifying condition. What would qualify a person for the program would disqualify him from protection under § 504.

Here, the Tenth Circuit has erroneously adopted the "except for" interpretation of "otherwise qualified" with regard to Petitioner infants' claims of discrimination in the provision of medical treatment. The Tenth Circuit specifically noted that, absent a handicap (the "except for" test), an infant would not need the

benefit (*i.e.*, medical treatment) and thus would not be "otherwise qualified" to receive the medical treatment (A-71). In other words, because one's handicap is a qualification for receipt of the medical care for the handicap, under the "except for" reading of § 504, consideration of the handicap is excluded — thus, an infant will *never* be "otherwise qualified" for the medical care for the handicap. This absurd result would follow any time the "except for" reading of "otherwise qualified" is applied to evaluate a claim of discrimination in a program or activity, such as health care, to which one's handicap is relevant.

Under this Court's holding regarding § 504's requirements, however, a handicapped infant should be "otherwise qualified" to receive medical care if he is able to meet the reasonable and essential requirements for receipt of medical care *in spite of* his handicap. Thus, if the medical benefit of treatment for an infant exceeds associated medical risks, then a handicapped infant should be "otherwise qualified" under § 504 to receive that treatment.

Even under the Tenth Circuit's strained interpretation of "otherwise qualified," however, the infant Petitioners stated a cause of action under § 504 that the Tenth Circuit failed to recognize. The Amended Complaint specifically alleged that Petitioner infants were not only denied life-saving beneficial medical treatment for their handicap, but also that they were denied standard medical care soley on the basis of handicap for conditions *wholly unrelated* to their handicapping conditions (A-15 to -16). For example, the Amended Complaint states that Carlton Johnson was refused fluids for dehydration and antibiotics for an ear infection (A-13, -16). This scenario is analagous to that proposed by Justice White in his dissenting opinion in *Bowen* as an example of a cognizable claim under § 504. 476 U.S. at 655. *See also Glanz v. Vernick*, 750 F. Supp. 46 (D. Mass. 1990). Even under the "except for" analysis, Petitioner Carlton Johnson would thus be "otherwise qualified" for this type of medical care because infants without spina bifida could

experience an ear perforation or dehydration and would receive treatment. At the very least, the Tenth Circuit's opinion must be reviewed to prevent discrimination against handicapped infants in the provision of basic medical treatment that would certainly be given to an infant who was not handicapped.

II. The Tenth Circuit's interpretation of "otherwise qualified" effectively nullifies § 504 as a vehicle for redressing claims of discrimination against the handicapped in the provision of health care.

"Section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportion, education, health services, or any other Federally-aided programs." S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388 (West 1975). This "broad government policy", *Id.* at 6390, extends protection from discrimination to any handicapped individual who is "otherwise qualified" to participate in federally financed programs or activities.

The Tenth Circuit's interpretation of "otherwise qualified" is not only inconsistent with this Court's reading in *Southeastern*, but has broad implications for all programs to which § 504 applies, and undermines the legislative purpose of the Act — namely, to proscribe discrimination against handicapped individuals in *all* programs receiving federal financial assistance. It effectively removes from § 504 protection all claims of discrimination in a program or activity to which one's handicap is relevant to one's qualifications, significantly restricting the scope of the statute. Because the majority of a handicapped person's health care needs will be related to their handicapping conditions, the impact of the Tenth Circuit's Opinion is to effectively remove health care from the programs to which § 504 applies.

Unless a handicapped person requires medical treatment for a condition that could occur regardless of whether he was

handicapped, no § 504 claim could be asserted when treatment is denied — even though the sole reason for the denial is an unjustified consideration of one's handicap. Thus, under the Tenth Circuit's interpretation of "otherwise qualified," no § 504 violation could be asserted based on a hospital decision to withhold, regardless of the medical benefit to the patient: treatments from AIDS patients for complications of this handicap; dialysis from persons with kidney failure; and insulin from diabetics. In each of these circumstances, the handicap is related to and in fact a qualification for receipt of the specific medical treatment for the handicap.

Clearly, a non-handicapped person will never be in need of medical treatment for any of these handicapping conditions. Yet under the Tenth Circuit's rationale, a handicapped person must show that a non-handicapped person received the specific medical treatment that he has been denied in order to be "otherwise qualified" for the treatment. Therefore, § 504 would apply to prohibit discrimination against persons with handicaps *only* when the same medical services are provided for persons without such handicaps, which seldom occurs.

Moreover, in effectively excising the statute's protection of handicapped persons from discrimination in the administration of health care, the Tenth Circuit vitiated the statute's protection of handicapped infants. An infant will rarely, if ever, need to avail himself of § 504's protection in education, transportation, housing, or employment programs. As a practical matter, health care is the only arena in which a handicapped infant is likely to seek redress under § 504. Clearly, the effect of the Tenth Circuit's reasoning is to deny to the most vulnerable handicapped persons — handicapped infants — any protection under § 504.

III. The Tenth Circuit's interpretation of "otherwise qualified" conflicts with those court decisions recognizing a § 504 claim in programs for the handicapped.

The Tenth Circuit, following the Second Circuit, held that if

infants required medical treatment only because they were handicapped, then they were not "otherwise qualified" to receive the medical treatment because they could not demonstrate that non-handicapped persons had received the specific medical treatment denied to them (A-71 to -72). Under this rationale, if a federally funded program has been developed *for* handicapped persons so that the only reason they would seek access to the program is *because* they are handicapped, then § 504 would not apply to prohibit discrimination *within* such programs.

A claim by a more severely handicapped person that he is subject to discrimination *vis-a-vis* a less severely handicapped person in a program to which only handicapped persons would seek access would never be actionable under § 504. This is so because the more severely handicapped person would never be able to show that he was "otherwise qualified" for the benefit or program since a non-handicapped person would never even be eligible for, let alone to seek access to, a program designed to assist the handicapped.[6] Thus, ironically, recipients of federal financial assistance who provide benefits or programs specifically for handicapped individuals *may* discriminate *among* handicapped persons — while only recipients of federal funds who do not provide benefits geared toward the handicapped would be constrained by § 504 under the Tenth Circuit's rationale.

The Tenth Circuit's interpretation conflicts with opinions from the Third, Seventh, and Eighth Circuit Courts of Appeal, as well as numerous federal district and state court decisions which have concluded that a cause of action under § 504 may be alleged by more severely or less severely handicapped persons seeking benefits for which they would not even be eligible absent their handicap. *See, e.g., Doe v. Colautti*, 592 F.2d 704

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[6]For example, a non-handicapped person would never require or seek access to a community living arrangement or a non-learning disabled child access to special education benefits.

(3d Cir. 1979) (implicitly recognizing a cause of action lies for discrimination in provision of hospital services to mentally handicapped person *vis-a-vis* physically handicapped persons); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983); *Plummer v. Branstad*, 731 F.2d 574 (8th Cir. 1984) (assuming that severity of plaintiffs handicaps is itself a handicap under § 504, this cannot be the sole reason for denying adult day-care funding); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981) (holding that a state-run facility could not divide services among retarded residents solely based on their degree of retardation or ambulatory status); *Goebel v. Colorado Dept. of Institutions*, 764 P.2d 785 (Colo. 1988) (failure to provide more severely disabled persons access to mental health services available to less severely handicapped states a claim under § 504); *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986) (stating in dicta that a cause of action under § 504 could be alleged if petitioner showed that she was denied a community living arrangement because she was mildly retarded, as opposed to severely or borderline retarded); *Gieseking v. Schafer*, 672 F. Supp. 1249 (W.D. Mo. 1987) (§ 504 claim could be alleged if habilitation services were denied petitioners solely because of some distinction between their handicap and that of other developmentally disabled individuals who receive these services).

If, as the Tenth Circuit has held, however, § 504 does not apply to programs or benefits required because of one's handicap, then no claim based on discrimination among classes of handicapped individuals would be actionable. Thus, the Tenth Circuit's interpretation of "otherwise qualified" conflicts with the interpretations of the Third, Seventh, and Eighth Circuits, as well as numerous federal district and state courts. This conflict should be resolved by this Court.

Conclusion

Based on the foregoing, Petitioners pray this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

James Bopp, Jr.*

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